Supreme Court, U.S.
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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1997

SUSAN WILSON

Petitioner,

v.

CITY OF PLANO, TEXAS

Respondent.

On Petition For Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Is an employer, pursuant to common law principles of agency, responsible for hostile environment sexual harassment committed by supervisory employees who use their supervisory status to effect the harassment?

II. Whether the United States Court of Appeals for Fifth Circuit decided an Important Federal Question in a manner which is in conflict with a prior decision of this Court?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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No.

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SUSAN WILSON

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On Petition For Writ of Certiorari
To The United States Court of Appeals For
The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner, Susan Wilson, respectfully petitions for a writ of certiorari to review judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is unpublished and is reproduced in the Appendix filed herewith ("App.") at 1a.

The opinion of the district court is unpublished and is reproduced in the App. at 4a.

STATEMENT OF JURISDICTION

The United States Court of Appeals decided this case on March 6, 1998. No petition for rehearing was timely filed in this case. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

STATUTE INVOLVED IN THIS CASE

The relevant provision of Tile VII of the Civil Rights Act of 1964, as amended, 42 U. S. C. § 2000e, et seq., (Title VII), is as follows:

§2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer --

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his

> compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely effect his status as an employee, because of such individual's race, color, religion, sex, or national origin . . .

STATEMENT OF THE CASE

The district court made the following findings of fact in granting the City's motion for summary judgment on Plaintiff's Title VII claim. Employee status findings were made as follows: Susan Wilson ("Wilson") was a building inspection clerk for the City of Plano's Building Inspection Department; Sue Truelove ("Truelove") was Wilson's immediate supervisor; Jack Newton ("Newton") was Truelove's supervisor; and, John Pierce ("Pierce") was Newton's supervisor. App. at 6a. The district court found that Wilson resigned from the City by submitting a resignation memorandum effective December 30, 1994. App. at 6a.

The district court found that during Wilson's tenure with the City, she never complained of a sexually hostile work environment. App. at 6a. The district court rejected

Wilson's contention that she had reported the harassment prior to her resignation. App. at 6a, n.1. Similarly, the district court rejected Wilson's contention that the City could be charged with constructive knowledge of the harassment leveled at Wilson based upon the pervasiveness of the harassment. App. at 15a.

The district court found that following Wilson's resignation, she filed a sexual harassment complaint with the City on January 26, 1995. App. at 7a. The day after the filing of the complaint, the City placed Newton and Pierce on administrative leave pending the outcome of the litigation. App. at 7a. The district court found that the City then undertook a massive investigation interviewing over 70 people identified by Wilson in her complaint. App. at 7a. Wilson conceded that the City undertook the investigation promptly after she made her complaint following her resignation. App. at 8a. Wilson further conceded that the City took her complaint seriously. App. at 8a.

The district court found that the City's investigation concluded that Pierce and Newton's conduct was inappropriate[1] and that subsequently Newton tendered his

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[1]Although the district court did not make specific findings as to the nature of the sexual harassment Wilson was subjected to by Newton and Pierce, the summary judgment evidence contains the following testimony by Wilson: Wilson testified that Newton made repeated lewd and sexually suggestive verbal comments including offensive jokes, to her and in her presence. Wilson testified that Newton touched, brushed and rubbed along side of her in ways she found to be offensive. Wilson testified that Newton propositioned her to engage in a three-way sex act involving Newton, Wilson and her sister. Wilson testified that Newton constantly used the term "fuck you" in talking to her and around her. Wilson testified that Newton frequently sought to engage her in conversation

resignation in lieu of being terminated by the City. App. at 8a. Pierce was suspended without pay for thirty days. App. at 8a. The district court noted that, based on the record, the reasons for the discipline were unclear but held, for the purposes of summary judgment, that the court would assume sexual harassment was a motivating factor. App. at 8a. The district court specifically rejected the City's contention that Wilson's claims of sexual harassment could not be validated, citing the testimony of Charlie Shapard, the City's Director of Human Resources. App. at 8a, n.3.

The district court noted that the City sought only to negate the notice element of Wilson's prima facie case. App. at 11a. The court noted the City's denial of actual and constructive knowledge before Wilson's resignation and the City's claim of taking prompt remedial action pursuant to an "effective sexual harassment policy." App. at 13 & 15a.

During the district court's analysis of the notice requirement, the court commented that the Fifth Circuit has attempted to determine "whether a sexual harassment plaintiff made 'anyone within the company hierarchy . . . aware of [her] complaints' or whether the plaintiff 'complained to those with authority to address the

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concerning Wilson's marital status and sex life and frequently commented on her anatomy. Wilson testified that Newton left a Wonder Bra ad on her desk commenting that Wilson was on his list of persons who needed one. Wilson testified that Newton asked her if she wore panties under her panty-hose. Wilson testified that she informed Newton that his conduct was offensive and unwelcome to her, but that Newton continued with this conduct until the day she resigned. Wilson testified that Newton's supervisor, John Pierce had himself sexually harassed her, and that he had knowledge of Newton's conduct and had failed to act to end the harassment.

problem.' " App. at 11a. The district court then considered Wilson's three arguments of notice. Describing the initial argument of notice as "facially appealing," the district considered whether: "[f]irst, Newton obviously had knowledge of his conduct which constituted sexual harassment against Wilson. Second, in light of Newton's supervisory capacity, whether this knowledge is imputable to the City through standard agency principles."[2] App. at 12a. The district court rejected this theory of agency based upon its own experience in a previous case which was affirmed by the Fifth Circuit in *Medders v. Austin College*, No. 4:94-CV-307 (E.D. Tex.), *aff'd*, No. 96-40272 (5th Cir. Nov. 7, 1996) (unpublished). App. at 12a.

Second, the district court considered Wilson's contention that Pierce's knowledge of Newton's harassment was sufficient to give the City actual knowledge. The district court found that this was a disputed issue of fact. App. at 13-14a. Without resolving the disputed issue, the district court concluded that even assuming that Pierce had actual knowledge of one event of "inappropriate conduct" [by Newton], the law generally does not allow a hostile environment claim based on one isolated event. App. at 14a.

Third, the district court rejected Wilson's claim of constructive knowledge based upon the pervasiveness of the harassment and ultimately found that the City had taken

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[2]The district court did not address the question of the extent of Newton's actual or apparent supervisory authority. The undisputed evidence showed that Newton had the delegated authority to hire, discipline, and to set other terms and conditions of employment, including the power to fire employees.

prompt remedial action once Wilson filed made her complaint pursuant to an "effective sexual harassment policy." App. at 15a.

In its conclusion, the district court emphasized that it was **not** finding that Wilson was not subjected to sexual harassment. App. at 16a. The court found that the City had conceded that Newton and Pierce engaged in inappropriate conduct. App. at 16a. Finding that there was no genuine issue of material fact that the City had no knowledge of the harassment in question, the district court granted summary judgment in favor of the City on Wilson's Title VII claim. App. at 17a.

Wilson subsequently filed a timely appeal of the district court's dismissal to the Fifth Circuit. On March 6, 1998, the Fifth Circuit panel affirmed the district court stating that it was affirming the district court "essentially for the reasons stated by the district court". App. at 1a-2a. The Fifth Circuit remanded on the City's cross-appeal, but that action is not material to this petition. On April 9, 1998, the Fifth Circuit denied Wilson's motion to stay mandate.

REASONS FOR GRANTING THE WRIT

I.

The United States Court of Appeals for the Fifth Circuit has entered a decision that is in conflict with the decisions of at least two other United States Courts of Appeals on the issue of how the principles of agency should be applied in hostile environment sexual harassment cases.

This Court should grant petitioner's request for writ of certiorari to establish uniformity among federal courts applying Title VII agency principles. Precedent established by this Court clearly mandates that *per se* rules of agency are both prohibited by and in direct conflict with the congressional intent of Title VII. *Meritor Savings Bank, F. S. B. v. Vinson*, 477 U.S. 57 (1986). Specifically, this Court has held that "while common law agency principles may not be transferable in all their particulars to Title VII, Congress' decision to define 'employer' to include 'any agent' of an employer, 42 U.S.C. § 2000e (b), surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible." *Id.* at 72. In accord, this Court's current edict[3] expressly provides that federal courts adjudicating Title VII claims are to follow

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[3]In *Meritor*, this Court specifically declines to issue a definitive rule on employer liability and agrees with the Equal Employment Opportunity Commission that Congress wants courts to look to agency principles for guidance in this area. 477 U.S. at 72.

common law principles of agency[4] and are to refrain from holding as a matter of law: (1) that employers are always automatically liable for sexual harrassment by their supervisors, and (2) that absence of notice to an employer insulates that employer from sexual harrassment liability of its employees. *Id.*

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[4]Section 219 of the Restatement (Second) of Agency provides as follows:

> (1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.
>
> (2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:
>
> (a) the master intended the conduct or the consequences, or
>
> (b) the master was negligent or reckless, or
>
> (c) the conduct violated a non-delegable duty of the master, or
>
> (d) the servant purported to act or speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

However, the United States Courts of Appeals are currently in conflict on this issue.[5] More importantly, the

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[5]*See, e.g., Jansen v. Packaging Corp. of Am.*, 123 F.3d 490 (7th Cir. 1997) (per curiam with seven concurring opinions) (holding standard for employer liability in cases of hostile environment sexual harrassment by a supervisory employee is negligence), *cert. granted, rev'd sub nom. Ellerth v. Burlington Indus., Inc.*, 118 S. Ct. 876 (1998); *Davis v. City of Sioux City*, 115 F.3d 1365, 1372 (8th Cir. 1997) (Arnold, J., dissenting) (discussing cases on both sides of the issue), *reh'g denied en banc*, 1997 U.S. App. LEXIS 22762, *cert. granted*, 66 U.S.L.W. 3686 (U.S. 1998); *Torres v. Pisano*, 116 F.3d 625 (2d Cir. 1997) (holding employer is liable if supervisor used his actual or apparent authority to further the harrassment or was otherwise aided by the existence of the agency relationship), *cert. denied*, _ U.S. _, 118 S. Ct. 563 (1997); *Wilson v. City of Plano*, No. 4:96-CV-190 (E.D. Tex. July 3, 1997), *aff'd*, No. 97-40947 (5th Cir. March 6, 1998) (unpublished); *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1446 (10th Cir. 1997) (holding employer is liable if supervisor abused delegated authority by using that authority to aid or facilitate perpetration of the harrassment); *Faragher v. City of Boca Raton*, 111 F.3d 1530, 1534 (11th Cir. 1997) (en banc) (holding employer is indirectly liable if there is an agency relationship which aids the supervisor's ability or opportunity to harrass his subordinate), *cert. granted*, _ U.S. _, 118 S. Ct. 1115 (1997); *Medders v. Austin College*, No. 4:94-CV-307 (E.D. Tex.), *aff'd*, No. 96-40272 (5th Cir. Nov. 7, 1996) (unpublished) (declining to impute liability to employer based solely on harrasser's own knowledge if the harrasser is also a supervisor); *Gary v. Long*, 59 F.3d 1391, 1397 (D.C. Cir. 1995) (holding employer is liable only if the harrassment accomplished by an instrumentality of the agency or through conduct associated with the agency status), *cert. denied*, _ U.S. _, 116 S. Ct. 569 (1995); *Sims v. Brown & Root Indus. Svcs., Inc.*, 889 F. Supp. 920 (W.D. La. 1995), *aff'd*, 78 F.3d 581 (5th Cir. 1996) (unpublished table opinion) (holding employer is liable in *quid pro quo* cases only if it knew or should have known of the employee's offensive conduct and did not take steps to repudiate that improper conduct); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1418 (10th Cir. 1987) (holding that employer liability could arise if the employer was negligent or reckless or the employee relied on the supervisor's apparent authority or the supervisor was aided in his harrassment by the existence of the agency relationship); *Karibian* v. *Columbia University*, 14 F.3d 773, 780 (2d Cir. 1994) (holding employer is liable for supervisor harrassment if the supervisor uses his actual or apparent authority to further the harrassment or was otherwise aided in accomplishing the harrassment by the existence of the agency relationship), *cert. denied*, 512 U.S. 1213 (1994); *see also Indest v. Freeman Decorating*, No. 96-30212, (5th Cir. argued Oct. 6,

Fifth Circuit's current application of Title VII agency principles in supervisor sexual harrassment claims is completely divergent to agency principles applied by other courts of appeals.[6]

A. The United States Courts of Appeals are in Conflict on the Issue of What Agency Theory to Apply in Sexual Harrassment Cases

The critical issue now presented to this Court is under what circumstances may an employer be held liable for sexual harrassment committed by its supervisors who use their employment status in the workplace to effect the harrassment. As stated above, the courts of appeals do not uniformly apply Title VII agency principles in these types of claims.

In the Second Circuit, for example, an employer is liable in this context "if the supervisor uses his actual or apparent authority to further the harrassment, or if he was otherwise aided in accomplishing the harrassment by the existence of the agency relationship." *Karibian*, 14 F.3d at 780. This Circuit also provides specific guidelines in making this determination:

1996).

[6] *Medders*, No. 4:94-CV-307 (E.D. Tex), *aff'd*, No. 96-40272 (5th Cir. November 7, 1996) (unpublished) (declining to impute liability to employer based solely on harrasser's own knowledge if the harrasser is also a supervisor); *compare Pfau v. Reed*, 125 F.3d at 936 n.5 (recognizing a different liability standard for supervisor hostile work environment sexual harrassment and supervisor *quid pro quo* harrassment).

> To recap, an employer will be held liable for the harassment perpetrated by one of its supervisors if:
>
> a) the supervisor was at a sufficiently high level in the company, or
>
> b) the supervisor used his actual or apparent authority to further the harassment, or was otherwise aided in accomplishing the harassment by the existence of the agency relationship, or
>
> c) the employer provided no reasonable avenue for complaint, or
>
> d) the employer knew (or should have known) of the harassment but unreasonably failed to stop it.

Torres, 116 F.3d at 634 (footnotes omitted).

In agreement with the Second Circuit, the Tenth Circuit holds that a corporate employer may be held liable under Title VII for hostile work envrionment sexual harrassment committed by one of its supervisors if any one of the following conditions are met:

> 1) The supervisor committed the harassment while acting in the scope of his employment. See Restatement (Second) of Agency § 219(1). (As previously indicated this will

rarely be a basis for employer liability.)

2) The employer knew about, or should have known about, the harassment and failed to respond in a reasonable manner. See Restatement (Second) of Agency § 219(2)(b).

3) If the employer manifested in the supervisor the authority to act on its behalf, such manifestation resulted in harm to the plaintiff, and the plaintiff acted or relied on the apparent authority in some way. See Restatement (Second) of Agency § 219(2)(d), clause 1.

4) If the employer delegated the authority to control the plaintiff's work environment and the supervisor abused that delegated authority by using that authority to aid or facilitate his perpetration of the harassment. See Restatement (Second) of Agency § 219(2)(d), clause 2.

Harrison, 112 F. 3d at 1446.

On the other hand, the District of Columbia Court of Appeals essentially holds that an employer is liable only if the harassment is accomplished by an instrumentality of the agency or through conduct associated with the agency status. *Gary*, 59 F.3d at 1397. The *Gary* court noted that, in one sense, a supervisor is always aided in accomplishing

hostile environment sexual harassment by the existence of an agency relationship with his employer because his responsibilities include close proximity to and regular contact with the victim. *Id.* However, the circuit court rejected this interpretation as an overly broad one. *Id.* Instead, the *Gary* court stated that evidence must be present supporting the allegation that the supervisor had expressly used his authority to assist in the harassment by, for example, reminding the victim that he could fire her if she refused his advances. *Id.*

Aligning itself with the D.C. Circuit, the Eleventh Circuit interpreted *en banc* the principles of agency under which an employer could be held liable for hostile work environment by a supervisor, finding only three ways:

> [G]enerally, an employer may be indirectly liable for hostile environment sexual harassment by a superior: (1) if the harassment occurs within the scope of the superior's employment; (2) if the employer assigns performance of an [sic] non-delegable duty to a supervisor and an employee is injured because of the supervisor's failure to carry out that duty; or (3) if there is an agency relationship which aids the supervisor's ability or opportunity to harass his subordinate. See Restatement (Second) of Agency § 219(1), (2)(d).

Faragher, 111 F.3d at 1534.

B. *Fifth Circuit Precedent on the Application of Title VII Agency Principles is in Direct Conflict with other Courts of Appeals*

The district court below held, without elaboration, that Fifth Circuit law plainly rejects employer liability for supervisor sexual harassment based upon agency principles because it would lead to strict liability. App. at 12a. Not only is this *per se* ruling in conflict with *Meritor* but it is also in direct conflict with other courts of appeals. Specifically, the Fifth Circuit's position is in sharp contrast to the position taken by the Second Circuit in *Karibian*: the Fifth Circuit has explicitly rejected strict liability for employers in sexually hostile work environment claims brought under Title VII.[7] The articulated rationale for this conclusion is that

> [C]ommon sense, as discussed both in the memorandum opinion and the *amicus curie* brief, dictate that strict liability should **not** apply to a sexual harassment claim and a plaintiff should be required to prove that the employer failed to take prompt remedial action. If the employer were to be held strictly liable even after having taken prompt

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[7] *Nash v. Electrospace, Inc.*, 9 F.3d 401, 404 (5th Cir. 1993) ("[an] employer is liable only if it knew or should have known of the employee's offensive conduct and did not take steps to repudiate that conduct and eliminate hostile work environment."). According to the unpublished *per curiam* opinion of the Fifth Circuit in *Sims*, this same standard applies in *quid pro quo* cases. 78 F.3d 581 (unpublished table opinion); *but see Pfau v. Reed*, 125 F. 3d 927, 936 n.5 (5th Cir. 1997) (a different panel of the Fifth Circuit recognizes a difference in liability standards for supervisor hostile environment sexual harassment and *quid pro quo* harassment).

> remedial action, then he would have no incentive to take such remedial action, and no incentive to create effective policies in order to prevent such abuses.

Medders, No. 96-40272 (5th Cir. Nov. 7, 1996) (unpublished). Such reasoning establishes within the Fifth Circuit a higher hostile-environment and *quid pro quo* burden than mandated by other circuit courts.

More importantly, the Fifth Circuit's Title VII agency burden is clearly inconsistent with this Court's decision in *Meritor*.[8] As observed by the *Harrison* court, "the fact that the supervisor has actual or apparent authority to control the victim's working conditions, and is aided in harassing the victim by that authority,[9] is sufficient to establish employer liability under the second clause of § 219(d)(2)." 112 F.3d

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[8]*Meritor* expressly rejected the notion that absence of notice to an employer necessarily insulates it from liability. 106 S.Ct. at 2408. Moreover, the district court's failure to make findings on the existence of a "strong and effective" sexual harassment policy and as to the existence of an effective grievance procedure makes this case fall squarely within the rule of law set forth in *Meritor*. *Id.* at 2408.

[9]Wilson's summary judgment evidence included a 10 page single-spaced detailed chronology of the sexual harassment she and other females had been subjected to on a daily basis by both Jack Newton and John Pierce. The chronology details daily verbal and physical harassment by Newton. At times, Newton would make off-the-wall sexually offensive comments to Wilson, and other times he would interject his offensive comments while he was performing official supervisory functions. Newton clearly was aided by his authority over Wilson in his daily harassment. *See Davis v. City of Sioux City, 115 F.3d at 1376* ("[i]n short, nearly all of Gross's [supervisor] harassment occurred at work and during work hours, and was the kind of conduct that he could engage in because of his position as a supervisor.")

at 1450.

Therefore, the divergence of the two lines of authority—*Wilson, Faragher* and *Gary* on the one hand, and *Torres/Kariban* and *Harrison/Hicks* on the other—requires this Court's intervention through the grant of the writ to the Fifth Circuit in order to achieve uniformity.

II.

The United States Court of Appeals for the Fifth Circuit has entered a decision which has decided an important Federal question in a way that conflicts with relevant decisions of this Court.

This Court should grant the Petition for a Writ of Certiorari and remand to the Fifth Circuit with directions to reconsider its *per se* applications of Title VII agency principles in light of this Court's decision in *Meritor.*

A. Fifth Circuit Rules of Agency as Applied Under Title VII are Prohibited by Supreme Court Precedent

Fifth Circuit *per se* rules of agency, as applied in sexual harrassment cases, squarely conflict with this Court's pronouncement that "absence of notice to an employer does not necessarily insulate that employer from liability." 106 S.Ct. at 2408. Here, the Fifth Circuit has unequivocally held that there can be no liability under Title VII for sexual

harassment by supervisory employees absent notice.[10] This ruling dictates that lower courts are not to consider such factors as whether the employer maintained an effective sexual harassment policy prohibiting sexual harassment by employees or whether the employer maintained an effective grievance procedure through which the employees could report the sexual harassment.

B. In Accord with the Fifth Circuit, the District Court Applied Improper Title VII Agency Principles

The district court, in the instant case, applied improper Fifth Circuit agency principles without first making pertinent findings of fact such as: (1) whether the City of Plano had a sexual harassment policy; (2) whether a policy was disseminated to all supervisors and employees; or, (3) whether the City had an effective procedure through which an employee could complain about the supervisor's harassment.[11]

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[10]*See, e.g., Medders*, No. 4:94-CV-307 (E.D. Tex.), *aff'd*, No. 96-40272 (5th Cir. Nov. 7, 1996) (unpublished); *Sims*, 78 F.3d 581 (5th Cir. 1996) (unpublished table opinion), *aff'g*, 889 F. Supp. 920 (W.D. La. 1995); *compare Pfau*, 125 F.3d at 936 n.5.

[11]Wilson averred in her controverting affidavit:

* * *

"I was unable to immediately report this sexual harassment because I was unaware of any sexual harassment policy ever promulgated, disseminated or implemented by the City of Plano.

* * *

I was never told there was a sexual harassment policy in the Policy & Procedures Book, nor was I ever given a copy of

Additionally, finding that the City could not be held liable to Wilson for supervisor harassment because there was no genuine issue of fact that the City had no knowledge of the harassment, the district court failed to make any findings as to the actual extent of Newton's authority over Wilson; failed to make any finding as to whether Pierce—who was actually Wilson's third-level superior—had knowledge of Newton's harassment; and, failed to make a finding as to the level of the City's management hierarchy held by either Newton or Pierce.[12]

The district court did, however, address the City's contention that it took prompt remedial action pursuant to an effective sexual harassment policy in addressing Wilson's complaint stating that

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that book nor was I ever provided an opportunity to read it."

Affidavit of Susan Wilson, p.4. The City of Plano's Employee Handbook dated February 1992, which was offered into evidence by Wilson, contained no specific sexual harassment policy in it. The grievance procedure referenced in the Employee Handbook provided that employees were encouraged to first take their complaint to the supervisor and attempt to resolve it informally. The handbook provided that if the complaint could not be resolved through the supervisor, the employee could submit a written complaint to Human Resources. The handbook did not specify to whom in Human Resources the complaint could be made nor did it make any reference to confidentiality.

[12]In a recent published decision of a panel of the Fifth Circuit, *Pfau v. Reed*, 125 F.3d at 937, the Court recognized that there was some Fifth Circuit authority for the proposition that a supervisor need not have ultimate authority to hire and fire in order to be considered an agent of the employer for Title VII purposes, as long as the supervisor had a "significant control of the Plaintiff's hiring, firing or conditions of employment." *Id.* at 937.

> [W]hether or not the City has a sexual harassment policy is not the litmus test of whether the City escapes liability for the actions of one of its employees. *Meritor Savs. Bank, F. S. B. v. Vinson*, 106 S. Ct. 2399, 2408 (1986). The hallmark of establishing a sexual harassment claim is determining whether the employer knew or should have known of the harassment in question and failed to take prompt remedial action. This prompt remedial action element has been applied even when the alleged harasser is a supervisor. *Sims v. Brown & Root Indus. Svcs., Inc.*, 889 F. Supp. 920, 927 (W.D. La. 1995).

App. at 15a (all other citations omitted).

Here, the district court purported to comply with and follow *Meritor*. However, the court simply went full circle. The court relied upon improper Fifth Circuit agency principles and failed to apply common law agency principles to determine whether the City could be held liable for the conduct of its supervisor. This issue should have been resolved in order to decide the ultimate issue of whether or not the City had taken prompt remedial action. Because of the district court's unyielding concern with the notion of "strict liability," it also failed to consider the question of whether Newton and/or Pierce used their actual or apparent authority to create an abusive work environment for Wilson or whether they were otherwise aided in accomplishing the harassment by the existence of the agency relationship. This

is precisely the inquiry this Court instructed the trier of fact to undertake in making ultimate determinations of employer liability for supervisor harassment under Title VII. This is an inquiry that the Fifth Circuit has consistently refused to undertake.

CONCLUSION

Based upon the authorities cited and the arguments presented, the Court should grant the petition for a writ of certiorari. The issues presented here are similar to those before this Court in *Faragher*. When the Court decides these issues, Petitioner requests that the Court remand this case to the Fifth Circuit for reconsideration in light of the Court's decision.

Respectfully submitted,

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APPENDIX A -- OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, DATED MARCH 6, 1998

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-40947
Summary Calendar

SUSAN WILSON,

Plaintiff-Appellant/Cross-Appellee,

versus

CITY OF PLANO, TEXAS,

Defendant-Appellee/Cross-Appellant.

Appeal from the United States District Court
for the Eastern District of Texas
(4:96-CV-190)

Before WIENER, BARKSDALE, and EMILIO M. GARZA, Circuit Judges. PER CURIAM:*

Susan Wilson appeals from the summary judgment dismissing her Title VII sexual harassment (hostile work environment) claim against her former employer, the City of Plano, Texas. Wilson contends that there is a material fact issue as to whether the City had actual or constructive knowledge of the alleged harassment and failed to take prompt remedial action; and, alternatively, that there is a material fact issue as to whether the harassing supervisor was an agent of the City and whether his knowledge of the harassment can be imputed to the City. Pursuant to our requisite *de novo* review of the summary judgment record, we **AFFIRM** essentially for the reasons stated by the district court. ***Wilson v. City of Plano, TX,*** No. 4:96-CV-190 (E. D. Tex. 7 July 1997)(unpublished).

The City cross-appeals the district court's order requiring it, the prevailing party, to bear its own costs. Pursuant to FED. R. CIV. P. 54(d), except when provided otherwise by statute or rule, "costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs". Although the district court has broad discretion in determining whether to award costs to a prevailing party, Rule 54(d) creates "a strong presumption that the prevailing party will be awarded costs". ***Schwarz v.***

Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opionion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Folloder, 767 F.2d 125, 131 (5th Cir. 1985). Our Court has held that, when a district court declines to award costs to a prevailing party, it should state its reasons for doing so. ***Id.*** at 131-132. See also ***Hall v. State Farm Fire & Cas. Co.***, 937 F.2d 210, 216-17 (5th Cir. 1991)l; ***Walters v. Roadway Express, Inc.***, 557 F.2d 521, 526-27 (5th Cir. 1977). Because the district court did not state reasons for requiring the City to bear its own costs, we **REMAND** the question of costs to the district court for reconsideration of its decision. If the district court determines that the City is not entitled to costs, it should state its reasons for that decision.

SUMMARY JUDGMENT AFFIRMED;
REMANDED FOR RECONSIDERATION
AS TO COSTS AWARD

APPENDIX B -- OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT, DATED JULY 3, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

SUSAN WILSON,	§	
Plaintiff,	§	
	§	
v.	§	4:96cv190
	§	
CITY OF PLANO,	§	
TEXAS	§	
Defendant.	§	

ORDER

On this day came on for consideration Defendant's Motion for Summary Judgment and Supporting Brief and after consideration of the motion, response and reply, the Court is of the opinion that the motion should be granted.

Introduction

Plaintiff, Susan Wilson ("Wilson"), was hired as a building inspection clerk by the Building Inspection Department of Defendant, City of Plano ("the City"). Wilson now brings suit solely under Title VII for damages from allegedly being subjected to a sexually hostile working environment. The City has moved for summary judgment on

Wilson's Title VII claim.

Summary Judgment Standard

The granting of summary judgment is proper if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). The trial court must resolve all reasonable doubts in favor of the party opposing the motion. *Casey Enterprises, Inc. v. American Hardware Mut. Ins. Co.*, 655 F.2d 598, 602 (5th Cir. 1981). The party seeking summary judgment carries the burden of demonstrating that there is no actual dispute as to any material fact in the case. This burden, however, does not require the moving party to produce evidence showing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 106 S. Ct. 2548, 2554 (1986). The moving party satisfies its burden by "pointing out to the district court . . . that there is an absence of evidence to support the nonmoving party's case." *Id.*

Once the moving party has satisfied its burden, the nonmovant must "set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e). If the nonmovant fails to set forth specific facts in support of allegations essential to that party's claim and on which that party will bear the burden of proof, then summary judgment is appropriate. *Celotex*, 106 S. Ct. at 2552-53. Even if the nonmovant brings forth evidence in support of its allegations, summary judgment will be appropriate "unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary

judgment may be granted." *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2511 (1986).

Factual Background

Wilson was a building inspection clerk in the City of Plano's Building Inspection Department. Sue Truelove ("Truelove") was Wilson's immediate supervisor. John Newton ("Newton") was Truelove's supervisor and John Pierce ("Pierce") was Newton's supervisor. Wilson resigned from the City with a memorandum of resignation that read in full:

> It has been a pleasure being part of the City of Plano's growth for the last eight and a half years. I am resigning my position to pursue personal endeavors effective December 30, 1994.

Defendant's Motion, Ex. 9. During her tenure with the City, Wilson never complained of a sexually hostile work environment.[1]

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[1]Plaintiff alleges that she "frequently complained to her immediate supervisor, Sue Truelove, concerning Newton's treatment of female employees, including the Plaintiff." However, the only evidentiary citation provided for this statement is a reference to Wilson's affidavit which reads:

> On or about December 13, 1994 and prior to my submitting my resignation on or about December 30, 1994, I told Sue Truelove that I was resigning to spend more time with my children. I also told her that I had developed a complex about the way Newton was treating myself and other women.

Affidavit of Susan Wilson, p.5. Initially, the Court notes that one complaint is

Following her resignation, Wilson filed a sexual harassment complaint with the City on January 26, 1995. The day after the filing of the complaint, the City placed Newton and Pierce on administrative leave pending the outcome of the litigation. The City then undertook a massive investigation interviewing over 70 people identified by Wilson in her complaint. *Deposition of Susan Wilson,*

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not evidentiary support for the assertion that Wilson "frequently complained." WEBSTER'S THIRD INT'L DICTIONARY, p. 909 (1986)(defining frequent as "often repeated or occurring"). Further, any attempt by Plaintiff to claim she complained about sexual harassment while still employed by the City directly controverts her deposition testimony:

> Q. Before you left on December 30, 1994, had you told any of your co-workers in your department that the reason you were resigning is because of claimed sexual harassment?
>
> A. No, Sir.
>
> Q. Is it correct that the only person you told that to was Kristie Bryant, and you told her approximately one week after you left your employment?
>
> A. Yes, Sir.
>
> Q. And that was the only person you told, correct?
>
> A. Yes, Sir.

Deposition of Susan Wilson, 79:3-79:16; *Albertson v. T.J. Stevenson & Co.*, 749 F.2d 223, 228 (5th Cir. 1984)("Thus, the nonmovant cannot defeat a motion for summary judgment by submitting an affidavit which directly contradicts, without explanation, his previous testimony.").

Finally, even indulging all reasonable inferences in favor of Wilson, the Court does not find that an enigmatic complaint of Wilson possessing "a complex" when coupled with her expressed desire to spend more time with her children constitutes notice to an employer of potential sexual harassment.

148:2-148:4. Wilson concedes that the City undertook the investigation promptly. *Deposition of Susan Wilson*, 148:17-20. Wilson also concedes that the City took her complaint of sexual harassment seriously. Id. at 151:6-151:9.

The City's investigation concluded that Pierce and Newton's conduct was inappropriate. Subsequently, Newton tendered his resignation in lieu of being terminated by the City. Pierce was suspended without pay for thirty days. The reasons for the discipline are unclear,[2] but for the purposes of this motion the Court will assume that sexual harassment was a motivating factor.[3]

In April of 1995, Wilson filed a charge of sexual harassment discrimination against the City. The EEOC, without ruling on the merits of her claim, issued a right to sue letter. Wilson has now brought suit in this Court.

Title VII Gender Discrimination

I. Allocation of Burdens

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[2]In evaluating the summary judgment evidence, the Court has found reference to the report prepared by the City on the results of its investigation. Inexplicably, neither party has submitted the report as summary judgment evidence.

[3]The City argues "Wilson's claim of sexual harassment could not be validated." *Defendant's Motion*, p. 4. However, the summary judgment evidence belies this assertion. *Deposition of Charlie Shapard*, 67:17-67:19 ("[T]here's obviously an arguable thing there as to whether it was [sexual harassment] or not.")

The Title VII framework is grounded on the United States Supreme Court opinions in *McDonnell Douglas Corp. v. Green*, 93 S. Ct. 1817 (1973) and *St. Mary's Honor Ctr., v. Hicks*, 113 S.Ct. 2742, 2747-48 (1993). Plaintiff must first bear the initial burden of establishing, by facts sufficient to warrant recovery, a *prima facie* case of unlawful discrimination. *Armstrong v. City of Dallas*, 997 F. 2d 62, 65 (5th Cir. 1993); *see St. Mary's Honor Ctr.*, 113 S. Ct. at 2746-47. Second, if plaintiff succeeds in proving a *prima facie case*, the burden of production is on defendant, "to articulate some legitimate, nondiscriminatory reason" explaining the defendant's complained of conduct." *McDonnell Douglas*, 93 S. Ct. at 1824. Should defendant articulate such reasons, plaintiff must then make a showing sufficient for a jury to find that the reason given was not the true motivation "for the [actions taken against plaintiff] and that unlawful discrimination was." *Bodenheimer v. PPG Indus., Inc.*, 5 F.3d 955, 957 (5th Cir. 1994) (emphasis in original); *Barrow v. New Orleans S. S. Ass'n*, 10 F. 3d 292, 298 n.22 (5th Cir. 1994); *see St. Mary's Honor Ctr.*, 113 S. Ct. at 2747. However, discriminatory intent may be inferred "in an appropriate case from substantial evidence that the [defendant's] proffered reasons are false." *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 994 (5th Cir. 1996)(en banc). Should plaintiff fail to satisfy the burden of proof on either the first or third step, plaintiff's claim fails as a matter of law. *See St. Mary's Honor Ctr.*, 113 S. Ct. at 2748.

II. Plaintiff's Title VII Prima Facie Case

The Fifth Circuit has held that in order to establish a claim for a hostile work environment, the plaintiff must show

the following:

1) The employee belongs to a protected group;
2) the Employee was subjected to unwelcome sexual harassment;
3) the harassment complained of was based upon sex;
4) the harassment complained of affected a term, condition or privilege of employment, and
5) respondeat superior[4], i.e., that the employer knew or should have known of the harassment in question and failed to take prompt remedial action.

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[4]The Court has previously held that it believes the Fifth Circuit would find the term "respondeat superior" is a misnomer in this context. As other circuit courts have noted, the doctrine of respondeat superior, a derivative or vicarious liability doctrine, has no relationship to whether the employer knew or should have known of the harassment in question and failed to take prompt remedial action. *Hirschfeld v. New Mexico Correction Dept., 916 F.2d 572, 577 n.5 (10th Cir. 1990)("This negligence standard for employer liability occasionally has been mislabeled as 'respondeat superior.' ")*; *Guess v. Bethlehem Steel Corp.*, 913 F.2d 463 (7th Cir. 1990)("The problem is merely a semantic one; the standard has been mislabeled. It is not respondeat superior."); Glen A. Staszewski, *Using Agency Principles for Guidance in Finding Employer Liability for a Supervisor's Hostile Work Environment Sexual Harassment*, 48 VAND. L. REV. 1057, 1079 n.135 ("The Flagship court erred by labeling its requirement of notice respondeat superior. * * * [W]hen the Fifth Circuit directed lower courts to ask whether an employer responded adequately to notice of sexual harassment, it directed them to make a determination regarding whether the employer should be held vicariously liable as an agent [sic, should read principal], not whether the plaintiff has proven respondeat superior.") The Court also notes that recent Fifth Circuit cases have omitted without comment the "respondeat superior" language from this element. *Cf. Waymire v. Harris County, Texas*, 86 F.3d 424, 428 (5th Cir. 1996).

Jones v. Flagship Int'l, 793 F. 2d 714, 719-20 (5th Cir. 1986), *cert. denied*, 479 U. S. 1065 (1987); *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 593 (5th Cir. 1995). In determining whether an environment is hostile or abusive, the Court must consider all of the surrounding circumstances which include: the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. *Harris v. Forklift Sys., Inc.*, 114 S. Ct. 367, 371 (1993).

For the purposes of summary judgment, the City only attempts to negate element five of Wilson's *prima facie* case. The City claims that it neither knew or should have known of the alleged harassment until January 1995 and when it learned of Wilson's claim it took prompt remedial action pursuant to an effective sexual harassment policy.

III. Did the City Know or Should the City Have Known of the Harassment in Question.

In analyzing the notice requirement, the Fifth Circuit has attempted to determine whether a sexual harassment plaintiff made "anyone within the company hierarchy . . . aware of [her] complaints" or whether the plaintiff "complained to those with authority to address the problem." *Nash v. ElectroSpace Sys., Inc.*, 9 F.3d 401, 404 (1993). Wilson raises three potential grounds to show that the City had knowledge of the sexual harassment before the January 26, 1995 filing of her formal complaint.

a. Knowledge Under Agency Principles

Wilson first attempts to prove the City's knowledge through a facially-appealing agency theory. First, Newton obviously had knowledge of his conduct which constituted sexual harassment against Wilson. Second, in light of Newton's supervisory capacity, this knowledge is imputable to the City through standard agency principles. Therefore, at the instant of the harassment, the City, without more, is deemed to have knowledge of the harassment through Newton.

This Court has previously rejected an identical argument and this rejection was affirmed by the Fifth Circuit:

> To the extent that [Plaintiff] argues that [the harasser] had "supervisory capacity," and therefore his notice of his own conduct may be imputed to [Defendant], the Court rejects this contention. Application of this theory would lead to almost *per se* liability by an employer when a supervisor sexually harasses an employee. *Sims v. Brown & Root Indus. Svcs., Inc.*, 889 F. Supp. 920, 927 (W.D. La. 1995) ("[T]he Fifth Circuit has taken the position that Title VII is not a strict liability statute").

Medders v. Austin College, 4:94-cv-307 (E.D. Tex.), *aff'd*, No. 96-40272 (5th Cir. Nov. 7,1996)(unpublished). Although the Court is not bound by the Fifth Circuit's unpublished opinion, Plaintiff has offered no authority which

would mandate a contrary result in this case.

b. Actual Knowledge of the Harassment by Pierce

Wilson claims that "[i]t is undisputed that Jack Pierce . . . did in fact directly witness at least one incident of sexual harassment on the part of Newton." *Plaintiff's Response*, p.9. However, the City does dispute this "undisputed fact." *Defendant's Reply*, p.4. Therefore, given the conflicting allegations, the Court now applies the summary judgment standard to this allegation.

There is no summary judgment evidence which show a genuine issue of material fact as to whether the City had actual knowledge of the harassment. Although Wilson alleges that Pierce directly witnessed at least one incident of sexual harassment, Wilson's citations to the summary judgment evidence does not support that statement. One of the citations, a reference to the deposition of Charlie Shapard, is not accompanied by the corresponding summary judgment evidence.

The other citation, a reference to the deposition of Tamira Shallenberger ("Shallenberger"), read in a light most favorable to Wilson, establishes only that Newton was terminated for "inappropriate conduct" and an unidentified third party confirmed that one time Newton engaged in some unspecified conduct with Pierce's knowledge. There is no indication in the record that the unspecified conduct was sexual harassment or the conduct was directed towards Wilson. In fact, in other portions of her deposition,

Shallenberger's testimony reflects a distinction, at least in the City's view, between "unwelcome sexual harassment" and "inappropriate behavior and conduct for a supervisor or manager of the City." *Deposition of Tamira Shallenberger,* 165:5-165:14. In short, the conclusory excerpt from Shallenberger's deposition describes only a "mystery event" which gives only "a scintilla of evidence in support of plaintiff's position" and is insufficient "for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.,* 106 S. Ct. 2505, 2511 (1986); *Defendant's Reply, p.4* (characterizing the incident described as a"mystery event.")

In any event, even assuming that Pierce had actual knowledge of one event of inappropriate conduct, the Court notes that the law generally[5] does not allow a hostile environment claim to be based on one isolated event. See *DeAngelis v. El Paso Mun. Police Officers Ass'n,* 51 F.3d 591, 595-96 (5th Cir. 1995). Therefore, *a fortiori,* a supervisor's failure to report an incident which does not constitute a hostile workplace cannot impute the City with

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[5]However, as summarized by one commentator, a single incident is not *per se* insufficient to constitute a hostile environment:

> If the practice is sufficiently pervasive, i.e., women are consistently and openly left out, it could be actionable, like the firefighters' refusal to dine out with their colleagues. A single incident likely would be insufficient, but if an employer excluded all women from a significant event, i.e., a weekend retreat with the biggest client or customer, it still might be actionable.

Theresa M. Beiner, *Do Reindeer Games Count as Terms, Conditions or Privileges of Employment Under Title VII?,* 37 B.C. L. REV. 643, 680(1996).

knowledge of a sexually hostile workplace.[6]

c. Constructive Knowledge

Plaintiff claims that the City had constructive knowledge of the harassment based upon its pervasiveness. However, Plaintiff fails to identify any evidence which supports this theory. Therefore, the Court finds that the City first knew and should have known of the sexually hostile workplace on January 26, 1995.

IV. Did the City Fail to Take Prompt Remedial Action Pursuant to an Effective Sexual Harassment Policy?

The City claims that it took prompt remedial action pursuant to an effective sexual harassment policy in addressing Wilson's complaint. However, whether or not the City has a sexual harassment policy is not the litmus test of whether the City escapes liability for the actions of one of its employees. *Meritor Savs. Bank, F. S. B. v. Vinson*, 106 S. Ct. 2399, 2408 (1986) ("[W]e reject petitioner's view that the mere existence of a grievance and a policy against discrimination, coupled with respondent's failure to invoke that procedure, must insulate petitioner from liability.") The hallmark of establishing a sexual harassment claim is determining whether the employer knew or should have known of the harassment in question and failed to take

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[6]Wilson does not argue that knowledge of the incident, although insufficient to establish actual knowledge of a sexually hostile workplace, is sufficient to trigger a duty on behalf of the City to investigate which would ultimately have lead to the discovery of the sexually hostile workplace.

prompt remedial action. *Jones v. Flagship Int'l*, 793 F. 2d 714, 719-20 (5th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987). This prompt remedial action element has been applied even when the alleged harasser is a supervisor. *Sims v. Brown & Root Indus. Svcs., Inc.*, 889 F. Supp. 920, 927 (W. D. La. 1995).

As discussed above, the City began a prompt, thorough investigation the day after it received Wilson's complaint. *See, e.g., Nash*, 9 F.3d at 404 (an employer who conducted an investigation and transferred the plaintiff to another section within one week of the complaint was "a model of [a] prompt, sensitive employer."); *Dornhecker v. Malibu Grand Prix Corp.*, 828 F.2d 307, 310 (5th Cir. 1987) (an employer who took twelve hours to resolve a complaint "speedily evaluated [the plaintiff's] complaint."). Wilson's sole complaint with the City's remedial action is that it came too late. Since the Court has already found as a matter of law that the City only gained knowledge of the harassment on January 26, 1995, the City's response, which began on January 27, 1995, was prompt and adequately remedial.

Conclusion

In light of the above findings, Wilson's Title VII claim, including a claim for constructive discharge, is precluded as a matter of law. The Court emphasizes that it is not finding that Wilson was not subjected to sexual harassment. In fact, the City concedes that Newton and Pierce engaged in inappropriate conduct. However, Wilson is not suing Newton and Pierce. Rather, the sole question for the Court was whether, based upon the summary

judgment record presented to the Court, the City knew, or should have known, of the harassment in question and failed to take prompt remedial action. The Court finds no genuine issue of material fact on this issue. Summary judgment should be granted in favor of the City on Wilson's Title VII claim.

IT IS SO ORDERED.

Signed this 3rd day of July, 1997.

/s/_____
UNITED STATES DISTRICT JUDGE